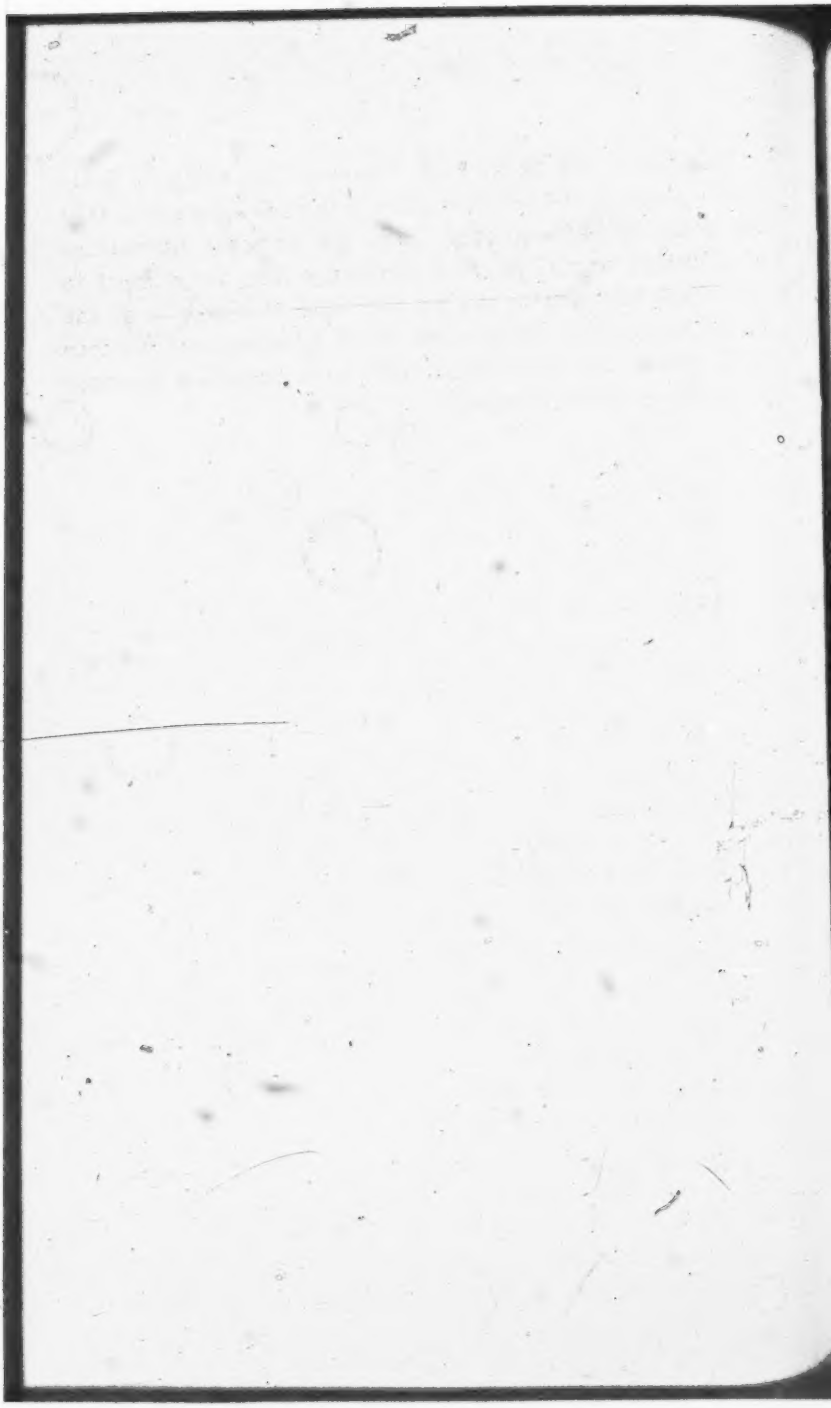

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 502

BERNARD EUGENE SMITH, ET AL., AS CO-PARTNERS, TRADING AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF THOMSON & MCKINNON,

Appellants,

vs.

J. N. LUMMUS, JR., AS TAX ASSESSOR OF DADE COUNTY, FLORIDA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

J. TOM WATSON,
Attorney General of Florida;
LAWRENCE A. TRUETT,
Assistant Attorney General of Florida,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 502

BERNARD EUGENE SMITH, ALFRED WILLIAM MANSFIELD, HENRY HOLT, CHARLES FRANCIS HALEY, FREDERICK COSSITT ROGERS, TIMOTHY PATRICK BROSNAN, GEORGE HENRY ROSS, RICHARD FREDERICK TEICHGRAEBER, JOHN WHITNEY, JOHN WILEY JORDAN, JAMES ALOYSIUS KIERNAN, JAMES ARTHUR PRINDIVILLE, ANDREW MITCHELL MONTGOMERY, BENJAMIN EVANS BILLINGS, AND JOSEPH FRANCIS CROWLEY, AS CO-PARTNERS, TRADING AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF THOMSON & McKINNON,

Appellants,

vs.

J. N. LUMMUS, JR., AS TAX ASSESSOR OF DADE COUNTY, FLORIDA, VAN C. KUSSROW, AS ACTING TAX ASSESSOR, AND H. EARNEST OVERSTREET, AS TAX COLLECTOR IN AND FOR SAID COUNTY,

Appellees.

APPELLEES' STATEMENT AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Appellees believing that the matters set forth below will demonstrate the lack of federal question being raised or

decided by either the Circuit Court of Dade County, Florida, or the Supreme Court of the State of Florida, as well as the lack of substance in the question raised by this appeal, file this their statement in opposition to appellants' statement as to jurisdiction. Appellees include herein their motion to dismiss the appeal or in the alternative to affirm the judgment of the Supreme Court of the State of Florida on the ground that there was no federal question raised or decided as well as that the questions raised on behalf of appellants are so unsubstantial as not to need further argument. The matters here relied upon by appellees are more particularly stated below:

I.

No Federal Question Raised or Decided.

Bernard Eugene Smith, et al., a partnership doing business under the name of Thomson & McKinnon, filed their bill of complaint in the Circuit Court of Dade County, Florida, seeking an injunction against the collection of an intangible tax that had been levied against them by the tax assessor of Dade County, Florida, upon the marginal balances that were owing to this partnership by their Florida customers who had purchased stock "upon the margin". This levy is made against the balances as of January first of each year. Thomson & McKinnon claimed in paragraph 9 of their bill of complaint, in sub-paragraphs (a) through (x), in short, that they were not doing business within the State of Florida, and that these debit balances were not within the State of Florida, and therefore this property had no situs for taxation within the State of Florida. The tax assessor and tax collector filed a motion to dismiss this bill of complaint, which was granted.

Upon appeal to the Supreme Court of Florida this decision was reversed, the Supreme Court holding that the bill of

complaint stated a cause for equitable relief and the case was remanded to the lower court for further proceedings. (See appellants' exhibit 1).

Thereupon the tax assessor and collector filed their answer to the bill of complaint denying all of the material allegations thereof and setting forth fully the facts showing that Thomson & McKinnon not only were actually domiciled in the State of Florida but were doing business in this state the same as any other concern that was engaged in the business of lending money and taking collateral security therefor. (See paragraph 9 of defendants' answer.)

Upon this answer being filed Thomson & McKinnon did not take advantage of their right to test the sufficiency of the same by either a motion to strike or setting down the same on bill and answer. (See sections 63.38, 63.40 and 63.41, Florida Statutes, 1941, or Florida Chancery Act Annotated, sections 38, 40 and 41). Thomson & McKinnon therefore accepted the answer as constituting a defense to their bill of complaint and in effect joined issue thereupon and thereafter a master was appointed to take the testimony and to make his findings of fact and conclusions of law thereupon.

The proof consisted of the testimony of one Mr. Kiernan, a partner in the firm. Defendants offered no testimony because it appeared from the testimony of Mr. Kiernan on direct examination that the firm was doing business in the State of Florida and therefore was not able to maintain the allegations of their bill of complaint to the contrary and upon cross-examination this state of facts was more fully developed and it appearing conclusively therefrom that Thomson & McKinnon were doing business in the State of Florida the same as any local concern, the master had no other alternative but to find that Thomson & McKinnon had not proven the allegations of their bill of complaint and found this as a fact in the following words: "The plaintiffs

have failed to establish the material allegations of their bill of complaint". (p. tr. 48—when reference is made to printed transcript herein it refers to the one filed in the Supreme Court of Florida by Thomson & McKinnon in their last appeal.)

Therefore, when the cause was brought on for final hearing upon exceptions to the master's report filed by the plaintiffs Thomson & McKinnon, the chancellor also found as a fact that Thomson & McKinnon had not maintained the allegations of their bill of complaint and the chancellor confirmed and approved the report of the special master.

The record was in this state when Thomson & McKinnon appealed the case to the Supreme Court of Florida for the second time and the only question that was or could possibly have been before the court was whether or not Thomson & McKinnon, the plaintiffs below, had sustained the allegations of their bill of complaint. Of course there was no question raised nor could any have been raised as to whether or not the intangible tax statute of Florida as applied to plaintiffs was constitutional or unconstitutional because Thomson & McKinnon were in the position of a litigant who had failed to prove the allegations of its bill of complaint and the question submitted was simply whether there was a variance between the allegata and the probata. Therefore, when the Supreme Court of Florida came to a decision in this case it was of course necessary for it to decide the case upon the issue that was presented, and it did so and said exactly what the master and the chancellor below said. I quote from the last paragraph of its decision: "The appellants failed to establish by competent testimony the material allegations of the bill of complaint". (See appellants' exhibit 2.) However, before reaching this conclusion the Supreme Court of Florida very carefully analyzed the record that was before it and in great detail pointed out why the testimony of Mr. Kiernan did not

sustain the allegations of the bill of complaint and among other things said:

> "The customer resides in Florida, the original payment was made by him in Florida at the branch office; interest and broker commissions are paid in Florida; Florida law protects the branch office and business transactions had therein; Florida courts provide forums for adjudication of differences arising out of transactions, and for these several reasons *it cannot be said that the 'debit balances' originated in New York, as alleged, to the exclusion of the State of Florida.*"

We cannot see how by any process of reasoning can it be said that there was a federal question before either the lower court or the Supreme Court when the record is examined in the light of what we have said.

II.

Questions Raised on Behalf of Appellants Are So Unsubstantial As Not To Need Further Argument.

If this Honorable Court is of the opinion that it should go further in its consideration of its jurisdiction than to determine the first ground of our motion to dismiss or affirm, then we respectfully submit that this court has by its opinions over the years decided it was proper to apply a taxing statute similar to the Florida intangible tax act to persons, firms or corporations whose business was analogous to that of Thomson & McKinnon; however, in most of these cases the proof of an actual situs and the doing of business in the state was not as clear and convincing as in the instant case. We cite only a few of these decisions:

Metropolitan Life Ins. Co. v. *New Orleans,* 205 U. S. 395, 27 S. Ct. 499, 51 L. Ed. 853;

Liverpool & L. & G. Ins. v. *Board of Assessors,* 221 U. S. 346, 55 L. Ed. 762, 31 S. Ct. 550;

Wisconsin v. *J. C. Penney Co.*, 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267, 130 A. L. R. 1229;
Curry v. *McCanless*, 307 U. S. 357, 83 L. Ed. 1339, 59 S. Ct. 900, 123 A. L. R. 162;
Stone v. *General Contract Purchase Corporation*, 7 So. 2d. 806;
C. I. T. Corporation v. *Stone*, 7 So. 2d 811;
Stone v. *General Electric Contracts Corporation*, 7 So. 2d 811;
Stone v. *Universal Credit Co.*, 7 So. 2d, 820;
Stone v. *Yellow Manufacturing Acceptance Corporation*, 7 So. 2d 820;
This Honorable Court affirmed these cases in 87 L. Ed. 23, et seq.

The Supreme Court of Georgia relied on these decisions in a somewhat similar case that it had before it of *Settles* v. *Mutual Life Insurance Company*, 193 Ga. 495, 19 S. E. 2d 396, and gave one of the most comprehensive reviews of this Honorable Court's decision as could possibly be found in the reports. We commend it for consideration.

We find that the appellants are in the peculiar position in this case of being engaged in a general stock brokerage business in the State of Florida and of paying occupational taxes for the privilege of engaging in such a business in the State of Florida but that they are contending that they are not engaged in business in the State of Florida simply because they make some sales of stock "on the margin" which according to their contention may or may not be delivered to the customer and they make such a contention regardless of the fact that in these marginal sales transactions they are dealing with Florida customers under a contract executed in the State of Florida and are doing a general stock brokerage business within the State of Florida, all of which is permissible and protected because

the State of Florida maintains an organized society and must have revenue in the form of taxes with which to do so.

In conclusion we respectfully submit that from our examination of this Honorable Court's decisions we find that this court is more concerned with the practical operation of a tax in relationship to the benefits conferred by a state than in the ethereal theories that have been advanced before it from time to time.

Wisconsin v. *J. C. Penney Co.*, 311 U. S. 435, 444; 85 L. Ed. 267, 270; 61 S. Ct. 246; 130 A. L. R. 1229;
Utah v. *Aldrich*, 316 U. S. 172, 86 L. Ed. 1358.

WHEREFORE, appellees respectfully submit this statement showing that there was no federal question involved in this case either in the lower court or in the Supreme Court of Florida and that the questions submitted by the appellants to this Honorable Court are so unsubstantial as not to need further argument and appellees respectfully move the court to dismiss this appeal or in the alternative to affirm the decision of the Supreme Court of Florida entered herein.

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Attorney General,
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